

CALIFORNIA ENERGY COMMISSION

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**STATE OF CALIFORNIA
ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION**

In the Matter of:

La Paloma Generating Company's)	DOCKET NO. 98-SIT-1
Petition for Jurisdictional Determination)	
under Public Resources Code)	DISSENTING OPINION
Section 25540.6)	

The Committee states, in section V (p. 14) of its proposed decision on the "Petition for Jurisdictional Determination" (Petition), that the Petition represents an "extension of the NOI exemption rationale." The Committee concludes that La Paloma, the Petitioner, qualifies for an exemption from the state's Notice of Intent (NOI) requirements, but at the same time, recommends that the Commission's Energy Facility Siting Committee "immediately move to examine the propriety and necessity of modifications to the NOI exemption process." [p. 15] The Committee further recommends that the Commission reconvene the **1996 Electricity Report (ER 96)** Standing Committee to review the integrated assessment of need. [p. 15]

In my view, the Commission should evaluate the risks associated with its latest interpretation of Assembly Bill 1884 (Chapter 1108, Statutes of 1993 [AB 1884]), as reflected in the **1994 Electricity Report (ER 94)** and **ER 96**, before it agrees to extend the rationale further. I am concerned, in part, because the Committee appears to believe the NOI process is no longer necessary. While I believe the NOI and the Application for Certification (AFC) processes merit evaluation, neither the Legislature nor the Commission has yet determined that the NOI process is unnecessary, yet, for all intents and purposes, that will be the result of this decision for natural gas-fired power plants, if approved.

Before making such a determination, the Commission should carefully review the relationship between the Integrated Assessment of Need, the NOI, and the AFC¹. In the Warren-Alquist Act, it is the relationship among these three Commission functions

¹ The Commission would subsequently have to convince the Legislature to do the same.

that justifies any state interest in power plant certification² as opposed to returning the latter functions to local jurisdictions without any input from the state on the former function.

What follows is what I believe AB 1884 does and does not do, what the Commission, therefore, can and cannot do, and what I believe we need to consider, relative to our mandate, in evaluating this Petition.

Applicability of AB 1884

To use AB 1884 as the basis for granting an NOI exemption, the Commission must look at the law in its entirety and, in so doing, assure itself of the reasonable applicability of the NOI exemption provisions to the subject applicant. AB 1884 modified various provisions of the Warren-Alquist Act—relating to project need and NOI exemptions, which are:

- that the statement of need in the applicant's AFC include, where applicable, a statement that its project was the result of a competitive solicitation which was consistent with the Commission's integrated assessment of need;
- that the Commission's findings regarding a proposed project's conformity with the Commission's integrated assessment of need include, where applicable, whether the project was the result of a competitive solicitation which was consistent with the Commission's integrated assessment of need;
- that the Commission affirmatively find an applicant's proposed project conforms with its integrated assessment of need, if the project is the result of a competitive solicitation which was consistent with the Commission's integrated assessment of need. (AB 1884 made similar modifications to the Commission's required small power plant exemption findings);
- that a proposed natural gas-fired project need not file an NOI if it was the result of a competitive solicitation or negotiation which was consistent with the Commission's integrated assessment of need.

I believe the proposed decision goes beyond these provisions in that law. I, therefore, cannot support its approval. If the Commission believes the NOI process is no longer necessary, and I am not convinced of that, it should sponsor legislation to that effect.

The Independent Energy Producers Association (IEP) sponsored, and Assemblymember Byron Sher authored, AB 1884 in early 1993, just as the California Public Utilities Commission (CPUC) was about to finalize the first Biennial Resource Plan Update (BRPU) of the utilities' Standard Offer Number 4. At the same time, the Sacramento Municipal Utility District had an outstanding competitive solicitation for new resources to meet its future needs. Other publicly owned utilities were in various stages of competitive solicitations, as well. Following completion of its **1992 Electricity Report**, the Commission participated actively in the CPUC's BRPU

² This also justifies the Commission's role, rather than locals', as lead agency in the California Environmental Quality Act (CEQA).

proceeding and was reasonably successful in defending its basis for determining each investor-owned utility's need for new resources in that proceeding.

Under existing law at the time, winners in these solicitations faced some daunting regulatory prospects once they emerged from that competition. First, the Commission's Electricity Report process takes two years to complete, and the CPUC's process, or its public-utility equivalent, an average of an additional year to complete. Second, except in certain cases (typically cogeneration and solar thermal facilities), the winning project would have to file an NOI, a process which takes one year to complete. Finally, once the applicant successfully completed its NOI process, it had to file an Application for Certification (AFC), another one year process. Most significantly, within the AFC, the Commission had to determine that the proposed facility conformed with the Commission's most recent need forecast in order to issue the applicant a permit. Following these steps, an applicant faced the possibility that its proposal—authorized by the CPUC or a public-utility board, and consistent with the Commission's then-current need forecast—could fail to conform with the CEC's most recent need forecast which the Commission completed between the time the applicant received its authorization from the CPUC or utility board, and it received its NOI decision. To address this narrow area of conflict, the Legislature modified the law with AB 1884.

The question before us today is whether these are the circumstances the Petitioner now faces. I conclude they are not. Applicants do not need to endure a lengthy and uncertain solicitation process. Quite the contrary, applicants, according to the proposed decision, need only take advantage of the existing California Power Exchange or some alternative electricity pool to conform with demand—this is part of the existing market structure, and I have no objection to it. However, it is hardly a circumstance that warrants allowing applicants to circumvent what I consider to be an important adjunct to the permitting process.

Addendum to *ER 94* and Its Applicability during the Pendency of *ER 96*

I am familiar with, and in fact signed, the Addendum to ***ER 94***. However, I believe this addendum is open to many interpretations. Furthermore, I believe it incorrectly represented the intent of AB 1884 where it stated that, "...the forces of competition or the act of negotiation with competing developers should produce projects for which the NOI process of selecting three alternative sites is an unnecessary governmental action for environmental or ratepayer protection." [p. 2] If one further argues that we should broadly construe the intent of AB 1884 through the phrase "the result of a competitive solicitation or negotiation" to include sales to the California Power Exchange or some similar arrangement, there is essentially no feasible circumstance in which the Commission would require an NOI³. [pp. 2-3]

³ The fact is that natural gas-fired powerplants are today's conventional resource.

There is a second, more curious, requirement in the addendum, i.e., that the Commission determine applicants' eligibility for NOI exemptions on a case-by-case basis, rather than by regulation. While I am extremely uncomfortable with this requirement, I believe it is the only provision of the addendum to survive with the adoption of the **ER 96**. I argue this is true because there is only one passage in **ER 96** relating to this issue: "For gas-fired power plants which are the result of competitive solicitations or negotiations, we will continue our *process* for granting exemptions from NOI requirements to such projects." [**ER 96**, p. 75, endnote 1] (emphasis added) I interpret this to mean, I believe quite appropriately, that the Commission will continue to make these determinations case by case, since this is the only process described in the addendum—the rest is policy. While the proposed decision correctly states there is no indication that the Commission intends to evaluate NOIs differently during the pendency of **ER 96**, I conclude that there was no discussion of the issue at all in **ER 96** and that the footnote quoted above was an afterthought.

The Role of the NOI in the Energy Facility Siting Process

The Commission has exclusive authority to certify all in-state, thermal powerplants of 50 MW or more. The Commission's site certification process is completed in two phases: an NOI to file an AFC, and the AFC itself. Final certification depends on the Commission's assessment of need which is carried out in its Electricity Report process.

The 12-month NOI process includes public hearings in which affected parties are invited to participate. Filing the NOI signals a developer's intention to file an AFC. The applicant must include a minimum of three alternative sites and their related facilities in the filing. The purpose of an NOI is to determine the suitability of the proposed sites to accommodate the project, the relative merits of the alternative sites, and the general conformity with standards and the Commission's assessment of need, as adopted in the most recent Electricity Report.

The Commission will only consider those sites that conform with applicable standards. This includes conformity with all applicable laws, ordinances, regulations and standards, including long-range, land-use plans and guidelines. Acceptable alternatives must also conform with any findings and comments submitted by the California Coastal Commission and the San Francisco Bay Conservation and Development Commission. The Commission's final report contains findings on the acceptability and relative merit of each alternative site and findings and conclusions with respect to the safety and reliability of the project at each of the sites.

The Commission may approve an NOI if it finds at least two alternative sites are acceptable. The project proponent is then eligible to file an AFC with the Commission. The Commission acts as the lead agency and performs an environmental impact review consistent with the California Environmental Quality Act (CEQA) during the AFC process.

CEQA also requires an analysis of alternatives to the proposed project, but the process of considering alternative sites in the NOI differs from the alternatives analysis conducted in the CEQA process in a significant way: it is not the intent of the CEQA alternatives analysis to find an additional feasible site for the project. Rather, the purpose for this analysis is to determine whether an alternative site could reduce or eliminate the significant adverse environmental impacts associated with a project, as proposed. The lead agency must analyze a “no project” alternative for the same reasons. A reasonable range of alternatives allows decision makers to compare the effects of developing a project at the proposed site with those of another site.

An important question to consider, but not resolve in this decision, is whether the NOI process is a burden or a benefit. I submit that many merchant plants would benefit from the NOI process and its ability to establish the eligibility of sites for future development of a power plants and related facilities. Many of the applications the Commission is reviewing, or will soon begin to review, face uncertainties because they are trying to perform both the NOI and the AFC functions at once. If applicants filed NOIs first, they would be able to pursue already approved sites at the appropriate pace.

Conclusion

For these reasons, I believe the Commission should deny Petitioner’s request for an exemption from the NOI process. For the benefit of the Commission, La Paloma and future petitioners, we should act on the Energy Facility Siting Committee’s recommendation to examine the NOI process as well as the appropriate conditions under which an applicant would be exempted.

DATED: _____

MICHAL C. MOORE
Commissioner